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International Arbitration and Plans for an American Locarno

PART I

THE ARBITRATION RECORD OF THE UNITED STATES

THE recent statement of Foreign Minister Briand that France would be willing to subscribe with the United States to a mutual agreement for the renunciation of war has brought forth a response from American public opinion which may lead to official consideration of an engagement to renounce war as an instrument of national policy.

The Briand proposal was made on April 6, on the tenth anniversary of the entry of the United States into the World War. It was addressed to the American people in an interview with the Associated Press in Paris and read in part as follows:

> "For those whose lives are devoted to securing this living reality of a policy of peace the United States and France already appear before the world as morally in full agreement. If there were need for those two great democracies to give high testimony to their desire for peace and to furnish to other peoples an example more solemn still, France would be willing to subscribe publicly with the United States to any mutual engagement tending to outlaw war, to use an American expression, as between these two countries. The renunciation of war as an instrument of national policy is a conception already familiar to the signatories to the Covenant of the League of Nations and of the Treaties of Locarno. Every engagement entered into in this spirit by the United States toward another nation such as France would contribute greatly in the eyes of the world to broaden and strengthen the foundations on which the international policy of peace is being erected. These two great friendly nations, equally devoted to the cause of peace, would furnish to the world the best illustration of the truth that the immediate end to be attained is not so much disarmament as the practical application of peace itself."

The proposal evoked widespread discussion in the United States. On April 25, President Nicholas Murray Butler of Columbia University, in a letter to the *New York Times*, emphasized the immediate importance of Briand's suggestion, and appealed for an answer from the American people and the American Government. During the following month two model treaties were presented by unofficial American groups and given wide publicity in the press. One of these was made public on

May 29, by the American Foundation, organized by Edward Bok, to maintain the American Peace Award. The other, announced by President Butler on May 30, was prepared by Professor James T. Shotwell, Director of the Division of Economics and History of the Carnegie Endowment, and Professor Joseph P. Chamberlain, of Columbia University. This treaty was drafted in an effort to state just what the French offer would mean in the light of existing treaty obligations of the United States and France. It was based on provisions of the Locarno Treaty, providing that in no case will the parties attack or invade each other or resort to war against each other, and on provisions for arbitration and conciliation already embodied in existing treaties between the United States and France. While no official response to the Briand proposal has come from the American Government, popular interest of these recent unofficial proposals promises to bring the question to the attention of the Government and of Congress.

When the Briand proposal was first made public, many Senators, interviewed in Washington, expressed themselves in favor of the general principle embodied in the suggestion. The significance of such a treaty in relation to American policy was stressed by Senator Walsh of Montana, who said:

"In determining whether the United States ought . . . to enter into such a treaty, it must be borne in mind that, having taken such a step, there is no nation, except possibly Russia, whose advances of like character we could ignore or reject.

"I do not shrink from the general policy. On the contrary, I would rejoice to see my country enter upon it . . . I remark simply that there are implications in the proposal to treat with France on the basis of M. Briand's speech, that require the most profound consideration."

A review of American policy with respect to arbitration is particularly timely in view of this current discussion. What has been the official attitude of the United States towards the adoption of arbitration as a means of settling international disputes? To what extent has the United States actually used arbitration or conciliation in controversies with foreign governments? How does the record of the United States compare with the record of other powers?

A careful review of the record of this country shows that from the beginning of its history as a nation until the outbreak of the World War, the United States was a leader in respect to both the negotiation of arbitration treaties and the practice of arbitration. Since the war a number of European and Latin American countries have concluded agreements which extend the scope of arbitration beyond the point reached in treaties made by the United States, and in practice, some of the European states have shown a willingness to resort to arbitration in an increasing number of cases.

THE USE OF ARBITRATION BY THE UNITED STATES

The actual use of arbitration is perhaps the best test of a country's policy. On the basis of cases submitted to some form of arbitral settlement the early record of the United States compares favorably with other nations. In all, this country has arbitrated from 85 to 96 controversies with some twenty-five countries since 1794.*

Many of the disputes were of minor importance involving financial claims of citizens, confiscation of property, breach of contract and similar questions, but some of them covered important matters such as national boundaries, territorial differences, fisheries, rights of neutrals, and seizures during wartime.

The first case ever submitted to arbitration by the United States dealt with an important dispute with Great Britain. In 1794 relations between England and the United States were strained; the boundary between

*The latter figure is given by W. Evans Darby in a detailed compilation of arbitrations, published in his *International Tribunals*, pp. 765-927, 1907. Darby's index lists a total of more than 1,000 arbitrations, and is the most complete record of the cases of the 19th century. Arbitrations to which the United States was a party are reviewed by John Bassett Moore in *International Arbitrations*, 6 vol.

Maine and New Brunswick was in dispute, British ships had been seizing American vessels in the war with France, and American citizens were refusing to pay debts to British merchants. John Jay, a distinguished American jurist serving at the time as the first Chief Justice of the Supreme Court, went to London and succeeded in concluding a treaty with England which provided among other things for settlement of the disputes at issue by means of three arbitral commissions. Although the boundary question was not finally settled until 1847 and the commissions considering seizures and debts of American citizens encountered difficulties which delayed solution for several years, Jay's treaty was instrumental in reviving the practice of arbitration in modern times.*

SETTLEMENT OF THE "ALABAMA" CLAIMS, 1871

Another important controversy with England was settled by arbitration in 1871. The dispute arose from damages done by the Alabama and other vessels built and fitted out in England for the Confederate Government during the Civil War. The United States offered to arbitrate, the government declaring that, "There is no fair, equitable form of arbitrament to which (the United States) will not be willing to submit." The British Government at first contended that the question could not be referred to arbitrators because it involved "the dignity and character of the British Crown and the British nation." In 1863, Lord Russell, the British Foreign Minister, stated that, "Her Majesty's Government are the sole guardians of their own honor. They can not admit that they have acted in bad faith in maintaining the neutrality they professed. The law officers of the Crown must be held to be better interpreters of a British statute than any foreign government can be presumed to be." In the end, however, Great Britain consented to arbitrate the claims of the United States for damages done by the Alabama and the question was referred to a tribunal of five, which met at Geneva. The award, handed down in 1872, provided for the payment by Great Britain of $15,500,000, a vast sum for that time. The settlement of this dispute popularized arbitration in the United States and made a profound impression throughout the world.

*Arbitration between states was used in ancient Greece, and during the Middle Ages.

OTHER CASES SETTLED BY ARBITRATION

Other disputes with Great Britain submitted to arbitration include the Behring Sea Case, involving the right of Canadian fishermen to dynamite seal within the three mile limit (1895), the Alaska boundary settlement (1903), and the North East Fisheries Case (1909). Many minor questions have been referred to arbitral commissions. Boundary cases and private claims have been arbitrated with Mexico, and more or less important controversies have been arbitrated with France, Spain, Germany, Brazil, Colombia and other Central and South American governments.

Most of the awards in cases involving the United States have been carried out. In several instances, however, the United States rejected the award of the arbitrator, as in the North East Boundary Case, submitted in 1827, the claims submitted by Paraguay in 1860 and a case with Mexico in 1911. At the same time it may be noted that the United States on three occasions declined to accept awards in her favor in cases where the judgment appeared to be in error.*

DISPUTES NOT SETTLED BY ARBITRATION

A review of disputes not referred to arbitration is of equal importance in an impartial appraisal of the extent to which peaceful settlement has been utilized. While many controversies have been settled through the normal channels of diplomacy, a number have been regarded as unsuitable for submission to a third party or an arbitral commission. In general, such disputes have touched upon questions involving the prestige, national honor or territorial integrity of the country concerned. Failing settlement, they have usually resulted in war or intervention.

Including the American Revolution, the

*Venezuela, 1866; Mexico, 1868; and Haiti, 1884.

United States has fought five foreign wars. Controversies with foreign nations, however, have led to naval hostilities on at least three other occasions, in each of which Congress authorized action to protect American ships on the high seas. These disputes were with France, in 1798-99; with Tripoli, between 1801 and 1805; and with Algiers, in 1815. Military or naval action, usually without the consent of Congress, has been resorted to in disputes with Spain, when Florida was Spanish territory, with Hawaii, Samoa, China and Japan. In Central America and the Caribbean and to a lesser extent in South America, the United States has often resorted to intervention or some sort of naval or military action when disputes threatened American lives or property interests. Professor William R. Shepherd has cited thirty cases of intervention in Latin America during the past thirty years.* While some of these did not involve technical intervention, the history of our dealings with Latin America shows that the United States has been less willing to arbitrate disputes in this sphere of American interest than in any other part of the world. Interpretations of the Monroe Doctrine since Roosevelt's first term have tended to strengthen the contention that "the fiat of the United States is virtually law on the American continents."

Thus the extent to which the United States has actually used arbitration may be defined with some accuracy: minor disputes, financial claims and occasional important controversies with European powers generally have been referred to arbitration; disputes involving national honor or prestige have not been regarded as suitable for arbitration; disputes with Latin American countries and weaker powers such as China have seldom been arbitrated.

ARBITRATION TREATIES CONCLUDED BY THE UNITED STATES

A review of the manner in which arbitration has been used, however, is only a partial record of the policy of the United States. The treaties and agreements concluded with foreign governments for the purpose of providing arbitral procedure and peaceful settlement in case of future disputes, and the attitude of the government and Congress toward the general idea of arbitration is an integral part of the record. If less significant as a gauge of achievements, it is important as an indication of intention.

The nature of the first American arbitration treaty concluded by Jay in London has been indicated above. It provided for three commissions to determine certain specific points at issue between the United States and England, and had no application to future controversies which might arise.

THE TREATY OF GUADALOUPE-HIDALGO, 1848

Fifty-four years after the Jay Treaty a clause providing for arbitration was incorporated in the Treaty of Guadaloupe-Hidalgo, 1848, between the United States and Mexico. This clause, which called upon each country to consider, in the event of future differences, "whether it would not be better" to settle by means of arbitration, was apparently the result of a campaign launched as early as 1837 by the first American peace societies, which had been founded in New York and Boston in 1815. Petitions urging arbitration were forwarded to Congress by these and similar groups organized in other parts of the country, but prior to conclusion of the treaty with Mexico, Congress refused to respond to the movement. Article 21 of the treaty did not limit the disputes which might be arbitrated, but left it to each government to determine whether any specific question was suitable for submission. Although the United States has arbitrated several questions with Mexico, none of them has been based on this article.

Between 1850 and 1870 several resolutions, indicative of the interest in arbitration, were reported in Congress. One of these, submitted by Senator J. R. Underwood of Kentucky, in 1853, is typical:

> "Resolved, That the Senate advise the President to secure whenever it may be practicable, a stipulation in all treaties hereafter entered into with other nations providing for the adjust-

*Shepherd, William R., *Uncle Sam, Imperialist*, (*New Republic*, Jan. 26, 1927. P. 266-9.)

ment of any misunderstanding or controversy which may arise between the contracting parties by referring the same to the decision of disinterested and impartial arbitrators, to be mutually chosen."

Neither this resolution, nor others of a similar character were adopted. Twenty years later, however, the House passed such a resolution and the Senate adopted another somewhat less specific.

TREATIES PROPOSED BY FOREIGN COUNTRIES

Meanwhile other countries were beginning to negotiate arbitration treaties for the settlement of certain disputes which could not be settled by diplomacy. In 1883 the Swiss Government, after first sounding out the American State Department, proposed a general arbitration treaty with the United States, and suggested a draft including "all difficulties . . . whatever may be the cause" as fit subjects for arbitration. The United States failed to proceed with the matter, and Switzerland turned to other countries, eventually concluding treaties with Salvador, the South African Republic, Ecuador and Kongo.

In 1887, an active movement for arbitration began in Europe. A memorial phrased in general terms was signed by 232 members of the British House of Commons and sent to the President of the United States and both Houses of Congress. In the same year the French Chamber of Deputies circulated a similar petition. In 1890, a joint resolution of the American Senate and House requested the President to conclude arbitration treaties with governments on friendly terms with the United States. Both the French and British parliaments responded with resolutions expressing the hope that agreements might be concluded. Finally, after almost eight years had elapsed, negotiations were actually begun for a general arbitration treaty between Great Britain and the United States.

The drafting of a general treaty proved a difficult task. Up to that time arbitration treaties had for the most part related to specific matters or had been merely incorporated as a clause in general treaties of amity and commerce. Great Britain submitted that cases arising between states were of two classes, "private disputes in which the state is representing its own subjects as individuals," and "issues which concern the state itself. . . "* The first class, it was held, was unquestionably suitable for arbitration, but the second was on a different footing, because of the difficulty of finding an impartial arbitrator. Secretary of State Olney and Lord Salisbury engaged in a long discussion of the scope of the proposed treaty and an agreement was finally concluded in 1897. In brief, it provided for arbitration of pecuniary claims by a board composed of two arbitrators, one nominated by each country, and an umpire selected by the arbitrators. Controversies involving territorial claims were to be submitted to a tribunal of six jurists, three named by each country. An award to be final required a majority vote of five to one.

SENATE REJECTS BRITISH TREATY OF 1897

The American Senate, after prolonged discussion, first amended the treaty beyond recognition and ultimately, on May 5, 1897, failed to ratify it. The Senate's amendments to this treaty are significant as an indication of the kind of objections which have blocked the ratification of general and compulsory arbitration treaties by the United States up to the present time. The text of the amendment to Article I of the rejected treaty includes most of the important objections. The original article and the amendment (in italics) is as follows:

"The high contracting parties agree to submit to arbitration in accordance with the provisions and subject to the limitations of this treaty all questions in difference between them which they may fail to adjust by diplomatic negotiations, *but no difference shall be submitted under this treaty which, in the judgment of either power, materially affects its honor, the integrity of its territory, or its foreign or domestic policy; nor shall the question be submitted whether any treaty once existing continues in force; nor shall any claim against any state of the United States, alleged to be due to the Government of Great Britain, or any subject thereof, be a subject matter of arbitration under this treaty; Provided, That any agreement to submit, together with its formulations, shall in every case, before*

*Lord Salisbury, in a letter to Sir Julian Pauncefote, March 5, 1896, Sen. Doc. No. 231, 56th Cong. 2 sess.

it becomes final, be communicated by the President of the United States to the Senate with his approval, and be concurred in by two-thirds of the Senators present, and shall also be approved by Her Majesty the Queen of the United Kingdom of Great Britain and Ireland."

Until recently most countries have objected to including questions of national honor in arbitral agreements, and consequently there was nothing unusual in the first part of the Senate's reservation. The objection to including claims against American states was made by senators who feared that Britain might bring up the repudiated debts of some of the southern states.* It has been raised in connection with practically every arbitration treaty proposed with Great Britain. The most important amendment, however, was that providing in each case for submission to the Senate of the agreement to arbitrate. The reasons for this demand and its effect on the future course of arbitration, so far as the United States is concerned, are brought out in the record of the next twenty years.

EFFORTS OF PRESIDENT ROOSEVELT

The failure of the British treaty was followed five years later by an attempt on the part of President Roosevelt to negotiate a general "compulsory" arbitration treaty with the governments signatory to the Hague convention. Roosevelt was encouraged to make his attempt by the success of a treaty between France and Great Britain, signed October 14, 1903, which provided for compulsory arbitration of disputes of a legal nature or relating to the interpretation of treaties. Although it did not cover questions of national honor, the Franco-British treaty was generally regarded as marking a step in advance.

Between 1904 and 1905, treaties were negotiated with Great Britain, France, Germany, Switzerland, Italy, Portugal, Austria-Hungary, Sweden, Norway, Mexico and Japan. The first of the treaties, that with France, was reported to the Senate in February, 1905, and ratified with the consent of that body the same month. But a vital, if exceedingly short amendment, was added. It consisted of substituting the word "treaty," for the word "agreement" in article 2, thus requiring that each case, before submission, go to the Senate for approval. As originally signed this article read:

> "In each individual case the high contracting parties before appealing to the Permanent Court of Arbitration, shall conclude a special *agreement* defining clearly the matter in dispute and the scope of the powers of the arbitrators and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure.

President Roosevelt in a letter to Senator Lodge, written January 6, 1905, when the amendment was being considered in the Committee on Foreign Relations, expressed vigorous opposition to the proposed change. Declaring that the amendment "cuts the heart out of the treaty," he went on to say: "I think this amendment makes the treaties shams, and my present impression is that we had better abandon the whole business rather than give the impression of trickiness and insincerity which would be produced by solemnly promulgating a sham. The amendment, in effect, is to make any one of these so-called arbitration treaties solemnly enact that there shall be another arbitration treaty whenever the two governments decide that there shall be one."

REASONS FOR SENATE OPPOSITION

The reasons which led the Senate to add the amendment were brought out in the minority report on the treaties.* The section relating to the amendment read:

> "The firm grasp upon our relations with foreign governments, placed in the hands of a minority of one-third of the Senate by the Constitution, whereby entangling alliances and wars have been often prevented, is being relaxed and the people are losing that power of self-protection. It is silently passing from the hands of their representatives . . . into the sole and exclusive power of the President. . .
>
> "Such is the effect that must result from the conventions now before the Senate and, so far as can be seen, that is one of the real intents and purposes intended to be accomplished by their ratification. . .
>
> "This fatal door in these conventions, through which the rightful powers of the Senate will pass into the hands of the Executive, should be closed

*The total amount of the principal in default by American states for repudiation of debts is approximately $75,000,000.

*Sen. Doc. No. 115, 58th Cong. 3rd Sess.

so that a mere diplomatic agreement concluded by the President can not bind the Government of the United States and all the states and all the people to obey it as the supreme law of the United States. Our Government will become a true autocracy when the President is invested with this power."

THE ROOT TREATIES OF 1908 AND 1909

Although President Roosevelt refused to press the ratification of the other treaties after the incorporation of the Senate reservation, he consented in 1908 to renegotiate the treaties with a clause satisfactory to the Senate. Twenty-five agreements were negotiated by Secretary Root and twenty-two were ratified and came into effect for a period of five years. Eleven are still in force, including those with Great Britain, France, Brazil, Ecuador, Japan, Haiti, Netherlands, Norway, Peru, Portugal and Uruguay. One with Sweden lapsed in 1918 and was renegotiated in 1924.

The text of the French treaty, identical with the others, is as follows:

ARTICLE I. Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

ARTICLE II. In each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the arbitral tribunal and the several stages of the procedure. It is understood that on the part of the United States such special agreement will be made by the President of the United States, by and with the advice and consent of the Senate, and on the part of France they will be subject to the procedure required by the constitutional laws of France.

ARTICLE III. The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; it shall become effective on the day of such ratification; and shall remain in force for a period of five years thereafter.

Done in duplicate in the English and French languages, at Washington, this tenth day of February, in the year 1908.

ELIHU ROOT (*Seal*)
JUSSERAND (*Seal*)

THE TAFT PROPOSALS OF 1910

President Taft revived discussion of arbitration in 1910 by declaring in an address in New York that he did not "see any reason why questions of national honor should not be referred to courts of arbitration as questions of private or national property are." In another speech delivered before the American Society for Judicial Settlement of International Disputes in Washington, later the same year, he went further by saying:

"If now we can negotiate and put though private agreements with some other nation to abide the adjudication of International Arbitration Courts in every issue which can not be settled by negotiations, no matter what it involves, whether honor, territory or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish between them the same system which, through the process of law, has existed between individuals under government."

Sir Edward Grey, then British Foreign Minister, referred to the President's remarks in Parliament in 1911, and before the end of the summer negotiations for a general compulsory arbitration treaty, which went beyond anything hitherto proposed, were begun with Great Britain and France.

The texts as finally signed provided for obligatory arbitration of certain differences which were defined as justiciable, and made provision for referring all other questions to a Commission of Inquiry for impartial and conscientious investigation. If there was doubt as to whether any given question was justiciable the matter was to be decided by the Commission of Inquiry. Justiciable questions were to be referred to the Permanent Court of Arbitration at The Hague, or to some other arbitral tribunal. With the fate of the earlier treaties advocated by Roosevelt in mind, President Taft had included in the treaties a clause to the effect that the "special agreement" referring any given case to arbitration should be made "by and with the consent of the Senate."

When the treaties were reported to the Senate the clause providing that the Commission of Inquiry should decide whether a specific case was subject to arbitration when two parties were unable to agree was signaled out for attack, and was finally stricken

out. The majority report of the Committee, presented by Senator Lodge, argued on this point:

> " 'that each and every part of the treaty must receive the consent of two-thirds of the Senate. . . The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine . . . , the vital point would be whether our right to insist upon the Monroe Doctrine was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question.' Questions of immigration and of territorial integrity, national and state, were matters which 'no nation on earth could think of raising,' but which the treaty 'in certain contingencies rather invited other nations to raise' and 'to endeavor to force them before an arbitral tribunal. Such an invitation would be a breeder of war and not of peace, and would rouse a series of disputes, now happily and entirely at rest, into malign and dangerous activity.' "

In addition, the Senate appended a resolution which eliminated from the scope of the treaty any question which affects "the admission of aliens into the United States or the admission of aliens to the educational institutions of the several states, or the territorial integrity of the several states, or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any state of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy."

President Taft refused to accept these amendments and dropped the treaties.

THE BRYAN CONCILIATION TREATIES OF 1913

A series of treaties of another type, providing for conciliation, rather than arbitration, were negotiated by Secretary Bryan during the first term of President Wilson. In a formal statement sent to thirty-six foreign countries on April 24, 1913, Secretary Bryan described the nature of the treaties as follows: "The parties hereto agree that all questions of whatever character and nature, in dispute between them, shall, when diplomatic effort fails, be submitted for investigation and report to an international commission, (the composition to be agreed upon); and the contracting parties agree not to declare war or begin hostilities until such investigation is made and report submitted.

"The investigation shall be conducted as a matter of course upon the initiative of the commission, without the formality of a request from either party; the report shall be submitted within (time to be agreed upon) from the date of the submission of the dispute, but the parties hereto reserve the right to act independently on the subject matter in dispute after the report is submitted."

Thirty treaties of this character were negotiated and twenty-one were actually ratified. Although several amendments were proposed in the Senate, most of the treaties passed with only a few minor changes. Of the twenty-one which went into force, only those with China, Denmark, France, Great Britain, Guatemala, Italy, Portugal, Russia, Spain and Sweden have ever been in working order. Owing to the failure to fill vacancies caused by the death of commissioners, only three, those with Denmark, Portugal and Sweden, have been in order for several years.

The negotiation of the Bryan treaties marked the last important attempt on the part of the United States to extend the scope of arbitration. The World War intervened to prevent discussion of arbitration between 1914 and 1918, and since the war the United States has made no serious effort to conclude agreements with important powers.

THE FIRST HAGUE CONFERENCE, 1899

No mention has been made of the part played by the United States in the two Hague Conferences of 1899 and 1907, which resulted in the establishment of an international arbitral tribunal.

The first Hague Conference was called primarily to deal with the question of armaments, and did not include on the agenda proposals for creating an international court. The eighth item, however, called for "acceptance, in principle, of the employment of good offices, mediation and voluntary arbitration, in cases where they are available, with the purpose of preventing armed conflicts between nations . . . " The American

delegation went to The Hague with a definite plan for an international tribunal. An annex to the instructions given the delegates authorized them "to use their influence in the conference in the most effective manner possible to procure the adoption of its substance or of resolutions directed to the same purpose." Largely through the initiative taken by the United States and the support given by Great Britain, the final Convention provided for creation of the Permanent Court of Arbitration. The name does not describe accurately the true functions of the Court. It merely consists of a panel of judges appointed by each state which is a party to the convention. The list is published every year. Use of the Court is optional. In case the parties wish to settle a dispute through the Court they select from the panel the names of those judges whom they wish to serve on the tribunal.

Since 1904, forty-nine disputes have been referred to the Court and three to commissions of inquiry. Nineteen cases have been decided up to the present, seventeen of them being handed down before 1914.

U. S. PROPOSALS AT SECOND HAGUE CONFERENCE

At the second Hague Conference held in 1907 the United States endeavored to develop the Hague Tribunal into a permanent court "composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international cases by judicial methods and under a sense of judicial responsibility."*

Acting on these instructions the American delegation proposed a court consisting of fifteen judges, who were to meet annually and sit as long as necessary.

The difficulty of selecting the fifteen judges proved an insurmountable obstacle, and while the proposal was appended to the final act, it was not brought into force.

Since 1919, the United States has concluded only two bi-partite arbitration treaties with Sweden, 1924, and Liberia, 1926, essentially similar to the Root treaties of 1908-9, and has been a party to two international conventions providing for conciliation with Latin-American countries.

*Instructions to the American Delegation to the Second Hague Conference, U. S., *Foreign Relations*, 1907, p. 1528-39.

POST WAR DEVELOPMENTS

Outside the United States the scope of arbitration has been materially extended both by the Covenant of the League of Nations, the statute of the Permanent Court of International Justice, and by separate arbitration treaties concluded by many European and Latin-American states.

The degree to which the League Covenant extended provisions for pacific settlement of disputes may be briefly put. The terms of the Covenant provide:

1. All disputes likely to lead to rupture must be referred to arbitration, judicial settlement or inquiry.

2. Justiciable questions must be submitted either to the Permanent Court of International Justice or to some other tribunal. The members of the League agree that they will carry out in full good faith any award or decision that may be rendered. (Justiciable disputes are defined in the Covenant as "disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation or as to the extent and nature of the reparation to be made for any such breach.")

3. Disputes not suitable for arbitration or judicial settlement may be referred by one of the parties to the League Council for inquiry and report.

4. Any disinterested state may call the attention of the Council and the Assembly to any danger which seems to threaten the peace of the world.

SCOPE OF THE WORLD COURT

The Permanent Court of International Justice, better known as the World Court, embodies many of the features advocated by the United States at the time of the second Hague Conference, and actually constitutes a permanent court in the fullest sense of the term. The statute of the Court was drafted by a committee of eleven jurists appointed in 1920 by the Council of the League of Nations under the terms of Article 14 of the Covenant. The Court's jurisdiction "com-

prises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force."

The plan for the election of judges was proposed by Mr. Elihu Root. Nominations are made by the national groups composing the Permanent Court of Arbitration at The Hague, each group nominating four persons, not more than two of them to be of the group's own nationality. The Assembly and the Council of the League, acting separately, select eleven judges and four deputy judges from these nominees and no election is declared until the candidate has received a majority vote in both bodies.

The optional clause attached to the Protocol establishing the World Court which gives compulsory jurisdiction to the Court has been signed by 25 states. This in effect is the practical equivalent to 300 bi-lateral treaties for compulsory settlement of all legal disputes.

The Court has met regularly once a year since January, 1922. It has handed down seven judgments and rendered thirteen advisory opinions.*

In addition to their commitments under the League Covenant and the Court Protocol, a large number of states since the war have entered into bi-lateral and multi-lateral treaties for pacific settlement of international disputes. Between 1919 and 1926, there have been about 90 bi-lateral agreements providing for compulsory arbitration or conciliation, or both. Mr. Denys P. Myers, in a pamphlet published by the World Peace Foundation, "Arbitration and the United States," lists 89 bi-partite treaties and four multi-partite agreements which have been ratified since 1919. Mr. Noel Field, in a pamphlet prepared for the National Council for the Prevention of War in 1926,† has classified 53 bi-partite arbitration treaties according to the degree in which they outlaw war. He cites 25 compulsory arbitration treaties which provide for arbitral settlement of all disputes whatever their nature. Fourteen of the treaties, however, provide for a *compromis*, or special agreement, before any dispute can be referred to arbitration. A number of the more recent treaties, such as those signed by Switzerland with Italy, Poland, France, Greece and Spain, and by the Scandinavian states, provide for both conciliation and arbitration. In the event that conciliation fails arbitration must be resorted to.

The questions of vital interest and national honor, which made it difficult to arbitrate most important disputes prior to the war, have been largely overcome in these post-war treaties. The treaty between Switzerland and Germany, signed December 3, 1921, for example, provides for the obligatory submission to arbitration of the four classes of legal questions set forth in Article 36 of the Protocol of the World Court. The question whether or not a given dispute falls within one of these classes is determined, not by each party, as in the past, but by arbitration. Article 4 reads, in part, as follows:

> "If, in a dispute coming under one of the categories mentioned in Article 2, one of the Parties pleads that the question at issue is one which affects its independence, the integrity of its territory or other vital interests of the highest importance, and if the opposing Party admits that the plea is well founded, the dispute shall not be subject to arbitration, but to the procedure of conciliation. If, however, the plea is not recognized as well founded by the opposing Party, this point shall be settled by means of arbitration."

Other post-war treaties of compulsory arbitration go even further. For example, in the treaty between Peru and Uruguay, ratified February 15, 1922, the parties agree "to submit to arbitration disputes of whatever nature which, for any cause whatsoever, may arise between them which it may ever prove impossible to settle amicably by direct diplomatic negotiations." The treaty between Austria and Hungary, signed April 1, 1923, likewise provides for reference of any disputes to arbitration when no friendly agreement can be reached.

The extension of compulsory arbitration since the war has not been limited to the smaller powers. The Locarno agreements, which were signed at London on December 1, 1925, included two security and general arbitration treaties between Germany and

*See Information Service, Vol. II, No. 20 for summary of judgments and advisory opinions.

†*Field, N. H.* "Banishing War Through Arbitration." A brief sketch of post-war arbitration treaties.

Poland, Germany and Czechoslovakia, and two general arbitration treaties between Germany and France, and Germany and Belgium, which provided that "disputes of every kind . . . shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice" or to permanent conciliation commissions. But the Treaty of Mutual Guarantee, signed by Great Britain, France, Italy, Belgium, and Germany, included a sweeping provision for the renunciation of war, which was of even greater significance than the arbitration provisions. Article II of the Treaty reads as follows:

> Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other. This stipulation shall not, however, apply in the case of: (1) The exercise of the right of legitimate defense; that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 or 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarized zone immediate action is necessary. (2) Action in pursuance of Article XVI of the Covenant of the League of Nations. (3) Action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article XV, Paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a State which was the first to attack.

The limited scope of this report prevents a more detailed analysis of the provisions of recent arbitration agreements. The examples cited above, however, indicate the substantial advances made since the war by many European and Latin American countries in contrast to the United States.

List of References

SOURCE MATERIAL

League of Nations. *Treaty Series.*

Malloy, J. B., editor. *Treaties, Conventions, etc., between the United States and other Powers, 1776-1923.* Washington, Government Printing Office, 1910-23. 3 vols.

Moore, J. B. *History and Digest of International Arbitrations to which the United States has been a Party.* Washington, Government Printing Office, 1898. 6 vols.

Moore, J. B. *Principles of American Diplomacy.* New York, Harpers, 1918.

U. S. State Department. *Foreign Relations.* Washington, Government Printing Office. [Annual]

GENERAL REFERENCES

American Foundation, Inc. Draft of a Proposed Treaty for the Pacific Settlement of International Disputes.

Darby, W. E. *International Arbitration: International Tribunals.* London, Dent, 1900.

Field, N. H. *Banishing War Through Arbitration.* Washington, National Council for Prevention of War, 1926.

Foreign Policy Association. *Post-War European Treaties.* (Information Service, Vol. II, No. 16, Oct. 13, 1926.)

Protocol for the Pacific Settlement of International Disputes. (Pamphlet No. 30, Series of 1924-25.)

The Significance of Locarno. (Pamphlet No. 35, Series of 1925-26.)

The United States and the World Court. (Information Service, Vol. II, No. 20. Dec. 8, 1926.)

Myers, D. P. *America's Unfavorable Attitude Toward Arbitration Treaties.* (Current History. Feb., 1926. p. 656-62.)

Ralston, J. H. *The Law and Procedure of International Tribunals.* Stanford University Press, 1926.

Woolsey, L. H. *The Future of International Arbitration.* (American Journal of International Law. January, 1927. p. 111-17.)

World Peace Foundation. *Arbitration and the United States.* (Pamphlet Vol. 9, No. 6-7. 1926.)

PART II

A PROPOSAL FOR AN AMERICAN LOCARNO

Because of its practical importance as an American proposal for the renunciation of war, the Draft Treaty of Permanent Peace, prepared by Professor James T. Shotwell and Professor Joseph P. Chamberlain, is reprinted in full as a separate section of this issue of the Information Service. Professor Shotwell's comment on the treaty is also reprinted with the text.

DRAFT TREATY OF PERMANENT PEACE

between the UNITED STATES OF AMERICA and.....*

PART I

RENUNCIATION OF WAR

RENUNCIATION OF WAR *(General Treaty of Locarno, Art. 2)*

Article 1.—The United States of America and.....* mutually undertake that they will in no case attack or invade each other or resort to war against each other.

Article 2.—the stipulation in the above article shall not, however, apply in the case of—

LEGITIMATE DEFENSE PERMITTED *(Treaty of Locarno, Art. 2)* AND DEFINED *(Treaty of Locarno, Art. 5)*

a. The exercise of the right of legitimate defense, that is to say, resistance to a violation of the undertaking contained in the previous article,

provided that the attacked party shall at once offer to submit the dispute to peaceful settlement or to comply with an arbitral or judicial decision;

MONROE DOCTRINE

b. action by the United States of America in pursuance of its traditional policy with reference to the American continents,

provided that the United States will use its best endeavors to secure the submission to arbitration or conciliation of a dispute between an American and a non-American power.

GENERAL PROVISIONS

Article 3.—For the furtherance of universal peace among nations, the High Contracting Parties agree:

that in the event of a breach of a treaty or covenant for the compulsory peaceful settlement of international disputes other than this covenant, each of them undertakes that it will not aid or abet the treaty-breaking Power. In the event that the treaty-breaking Power is one of the High Contracting Parties, the other Party recovers full liberty of action with reference to it.

*Insert here the name of the other signatory. The Draft Treaty is drawn with especial reference to those Powers which are signatories to the General Treaty of Locarno, but is also capable of extension to other Powers. The text of the stipulation providing for the renunciation of war is literally that of the Treaty of Locarno; with this the Monroe Doctrine, as worked out historically in relation to non-European powers, is stated in parallel terms.

The measures to be taken in this regard shall be determined in the case of the United States of America by the action of its own Government, in the case of.....in accordance with its existing treaty obligations.

CODIFICATION OF INTERNATIONAL LAW

Article 4.—Recognizing the importance of accepted rules of law in the preservation of peace, the High Contracting Parties agree that they will undertake to further a progressive codification of international law based upon the renunciation of war as an instrument of policy, as set forth in this treaty.

DISARMAMENT

Article 5.—In view of the greater degree of security provided by this treaty, the High Contracting Parties undertake to cooperate with one another in furthering the progressive reduction of armaments and to that end to study the appropriate ways and means in international conferences on disarmament which shall meet at regular intervals.

PART II

ARBITRATION AND CONCILIATION

Article 6.—The High Contracting Parties agree to submit disputes arising between them to arbitration, judicial settlement, or conciliation as set forth in the following articles of this treaty.

provided that the dispute does not concern a matter which under international law is solely within the domestic jurisdiction of one of the High Contracting Parties;

nevertheless in every case the provisions of Part I shall apply.

ARBITRATION

(Adapted from the existing Arbitration Treaty between the United States of America and France, expiring February 27, 1928. The similar treaty with Great Britain will expire June 4, 1928, that with Japan on August 24.)

Article 7.*—Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration *or to the Permanent Court of International Justice*, established at The Hague, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.

Article 8.—In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration *or to the Permanent Court of International Justice* shall conclude a special agreement defining clearly the matter in dispute. If the matter is referred to the Permanent Court of Arbitration, the special agreement shall also define the scope of the powers of the Arbitrators and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure.

It is understood that on the part of the United States such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate.

*The text is identical with that of the existing treaty except for the possible reference to the Court of International Justice, as an alternative to the Court of Arbitration. The inserted text is given in italics.

CONCILIATION

(Adapted from the (Bryan) Treaty Between the United States of America and..... for the Advancement of General Peace: Articles 1, 2, 3, 4, 5)

Article 9.*—*Subject to the conditions of Article 6,* any disputes arising between the Government of the United States of America and the Government of ..... of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the High Contracting Parties do not have recourse to arbitration, be submitted for investigation and report *and recommendations for settlement* to a Permanent International *Conciliation* Commission constituted in the manner prescribed in the following article.

Article 10.—The International *Conciliation* Commission shall be composed of five members appointed as follows: Each Government shall designate two members, only one of whom shall be of its own nationality; the fifth member shall be designated by common consent and shall not belong to any of the nationalities already represented on the Commission; he shall perform the duties of President.

In case the two Governments should be unable to agree on the choice of the fifth commissioner, the other four shall be called upon to designate him, and failing an understanding between them, the provisions of Article 45 of The Hague Convention of 1907 shall be applied.

The Commission shall be organized within six months from the exchange of ratifications of the present convention.

The members shall be appointed for one year and their appointment may be renewed. They shall remain in office until superseded or reappointed, or until the work on which they are engaged at the time their office expires is completed.

Any vacancies which may arise (from death, resignation, or cases of physical or moral incapacity) shall be filled within the shortest possible period in the manner followed for the original appointment.

The High Contracting Parties shall, before designating the Commissioners, reach an understanding in regard to their compensation. They shall bear by halves the expenses incident to the meeting of the Commission.

Article 11.—In case a dispute should arise between the High Contracting Parties which is not settled by the ordinary methods, each Party shall have a right to ask that the investigation thereof be entrusted to the International Commission charged with making a report. Notice shall be given to the President of the International Commission, who shall at once communicate with his colleagues.

In the same case the President may, after consulting his colleagues and upon receiving the consent of a majority of the members of the Commission, offer the services of the latter to each of the Contracting Parties. Acceptance of that offer declared by one of the two Governments shall be sufficient to give jurisdiction of the case to the Commission in accordance with the foregoing paragraph.

The place of meeting shall be determined by the Commission itself.

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*The text of this section follows literally that of the Bryan treaties except where indicated by italics. Four changes have been made. (1) The Bryan treaties covered "any disputes of whatever nature they may be"; this section applies only to those which lie without the field of domestic law. (2) The Bryan treaties provided only for inquiry as to the facts; this section provides for "recommendations for settlement," which may enable the parties to adjust their difficulties but do not bind them to do so. (3) In the last article of the section the Bryan treaties allowed the parties to recover full liberty of action, but here (under Article 13) the provisions of Part I still apply, so that they do not recover liberty to go to war. They may not agree as to the settlement, but in that case they simply leave matters unsettled awaiting some more favorable basis of future agreement. (4) The provision in the second section of Article 1 of the Bryan treaties, that neither Party "shall resort to any act of force" during the period of investigation has been here transferred to a separate article (Art. 14), so as to apply as well to arbitration procedure.

Article 12.—The High Contracting Parties shall have a right, each on its own part, to state to the President of the Commission what is the subject-matter of the controversy. No difference in these statements, which shall be furnished by way of suggestion, shall arrest the action of the Commission.

In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of each Party ought in its opinion to be taken provisionally and pending the delivery of its report.

Article 13.—As regards the procedure which it is to follow, the Commission shall as far as possible be guided by the provisions contained in Articles 10 to 34 and Article 36 of Convention 1 of The Hague of 1907.*

The High Contracting Parties agree to afford the Commission all means and all necessary facilities for its investigation and report.

The work of the Commission shall be completed within one year from the date on which it has taken jurisdiction of the case, unless the High Contracting Parties should agree to set a different period.

The conclusion of the Commission and the terms of its report shall be adopted by a majority. The report signed only by the President acting by virtue of his office, shall be transmitted by him to each of the Contracting Parties.

Subject to the provisions of Part I, the High Contracting Parties reserve full liberty as to the action to be taken on the report and *recommendations for settlement* of the Commission.

INTERIM MEASURES†

Article 14.—During the procedure of conciliation or arbitration or judicial procedure, the High Contracting Parties agree—

(Adapted from the Bryan Treaty, Art. 1, Sect. 2

and

the Locarno Arbitration Treaties. Art. 19.)

a. not to resort with respect to each other, to any act of force, and in general to abstain from any sort of action whatsoever which may aggravate or extend the dispute.

b. to abstain from all measures likely to have a repercussion prejudicial to the execution of the decision or to the arrangement proposed by the Conciliation Commission or Court.

*There is a slight change here from the Bryan treaties. In the Bryan treaties the reference is to Articles 9-36. This has been changed so as to exclude Articles 9 and 35 of the Hague Convention which limited the scope of the Commission to fact finding, so that these two articles were not applicable to a Conciliation Commission with power to recommend terms of settlement.

†The provision of the Bryan treaties preventing measures of force during the period of investigation is here extended to apply to the cases of arbitration or judicial procedure, using the text of the Locarno treaties literally.

PART III

RATIFICATION

(Adapted from the (Bryan) Treaty between the United States of America and France for the Advancement of General Peace: Article 6.)

Article 15.—The present treaty shall be ratified by the President of the United States of America, with the advice and consent of the Senate of the United States, and by the.....in accordance with the constitutional laws of.....

It shall go in force immediately after the exchange of ratifications, and shall remain in force until the expiration of a period of twelve months after either Party shall have notified the other of the intention to terminate it.

In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereunto their seals.

Done at Washington this day of , the year nineteen hundred and

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COMMENT ON THE TEXT

By PROFESSOR JAMES T. SHOTWELL

When on the sixth of April last, on the tenth anniversary of America's entrance into the World War, M. Briand, Foreign Minister of France, stated in an interview with the Associated Press, in Paris, that France would willingly subscribe publicly with the United States to the outlawry of war as between the two countries, few at first in either France or the United States paid any attention to this most remarkable utterance. After attention had been called to it, however, by President Nicholas Murray Butler, favorable comment by statesmen and in the press, generally, indicated a wide and growing interest in the proposal. But there was a question in many minds as to what the offer meant. In the first place, it was addressed to the people of the United States rather than to the Government through diplomatic channels. In the second place, it used a formula unfamiliar to French diplomacy and the implications and bearing of it were not quite clear. This Draft Treaty is an effort to state just what the French offer would mean in the light of the existing treaty obligations of the United States and France. At least, this was originally the purpose of the present draft; but as work upon it proceeded, it became clear that the treaty might be framed in terms applicable to any other signatory of Locarno and to other non-American Powers as well, including even Japan. Viewed in this light, the draft became not merely an effort to clarify the offer of M. Briand, but to state the possibilities of an American Locarno.

It is doubtful if this drafting would have been undertaken if it had not been for a conversation which I had with M. Briand on March twenty-second, last, in which the general subject was discussed of the possibility of a joint statement by France and America of common ideals and attitudes in France and America with reference to the elimination of war. It was evident from this conversation that M. Briand was already studying the ways and means by which to give expression to this feeling of solidarity in fundamentals between the two great democracies in spite of all the technical difficulties which might arise and were then in fact arising over the question of disarmament. When, therefore, M. Briand, in the course of his tribute to America's participation in the War, stated these common ideals as the basis of a program for future policy, it seemed to call for some more definite understanding upon our part of so far-reaching a proposal. Consequently, in response to the request of some of my friends, to whom I expressed my conviction that the speech of M. Briand was in reality a serious offer and not merely a gesture of friendship, I have undertaken, in collaboration with Professor Joseph P. Chamberlain, to state the meaning of the Briand offer in the most definite terms possible, in the shape of a draft treaty which em-

bodies all the mutual obligations which the adaptation of the principles of Locarno to America would imply. For the text itself, Professor Chamberlain and I are jointly responsible.

OUTLINE OF THE TREATY

The Draft Treaty consists of two main parts: Part I on the renunciation or "outlawry" of war is in its main terms taken literally from the Treaty of Locarno. Part II, providing for arbitration and conciliation, is taken almost literally from our two existing treaties with France—all that we have bearing on this subject—the Arbitration Treaty of 1908 which expires automatically on the 27th of February, 1928, and the so-called Bryan Treaty "for the Advancement of General Peace." Both of these are adapted with very few verbal changes to fit in with Part I.

While this text has been prepared so as to apply to civilized States, it is perhaps necessary to say frankly that a treaty of this kind will hardly be found suitable for application with nations which have widely different conceptions of political institutions and varying degrees of political development. The "renunciation of war as an instrument of policy" should not be made a formula so all-inclusive as to prevent civilized Powers from measures of an international police under certain circumstances. This is perhaps the most difficult problem left us in the development of international justice. The Draft Treaty has been prepared with an eye to its possible application as between civilized Powers equal in sovereignty and capable of ensuring respect for law and treaty obligations. If it were to be made a precedent for universal application, some further consideration would have to be given to this problem. But the very merit of the Treaties of Locarno lay in the clarity of obligations as between States of equal political development, whose ideals were fundamentally similar. It is surely not a valid objection to a document of this kind that it does not attempt to make provision for universal application, if by so limiting its scope it can apply definitely as between the great civilized Powers. It is, after all, by steps such as these that the instruments of universal peace may finally be discovered.

The following document, therefore, is simply an attempt to set forth in the plainest language suitable to such matters what it would mean to the United States if it were to bind itself to policies of peace and not to resort to war as an "instrument of policy," to use the phrase in M. Briand's offer. A study of this document will show that it involves no real departure from our settled policies and that an American Locarno could be made the basis of an adjustment of the United States with all the existing instruments of peace that have gone into operation in recent years. Until now we have not found the way to make this adjustment. This Draft Treaty provides a program. It is a program which carefully safeguards American sovereignty with reference to every other prerogative except that of aggressive war. Surely, any American who considers the proposals laid down here would find it hard to deny their validity without, at the same time, denying the traditional policies and repeated statements of ideals of the United States with reference to this fundamental world problem of peace and war.

The fact that there is no real crisis in world affairs at the present moment does not argue that America has no immediate need of any such framework of peace as is proposed in this Treaty any more than it would argue our giving up armies and navies. The strategy of peace includes both; and the history of 1914 showed that the need of a definite agreed program for times of international crisis was even more important than the timetable of the General Staff. Only last March the Foreign Minister of Germany stated in the presence of the Foreign Ministers of France, England and Belgium that there could hardly have been a world war in 1914 had the nations been provided with the implements of international understanding which are embodied in the Treaty of Locarno and the Covenant of the League. This Draft Treaty does not go so far in its provisions as the Treaty of Locarno and has avoided all the entanglements of the League Covenant. At the same time, it provides against the use of war as an instrument of policy, and if adopted by the United States and the other Great Powers, including Japan, would so extend over the world the spirit of Locarno as to ensure not only effective measures of disarmament but world peace in so far as it is possible to guarantee peace by such measures of international insurance.

DETAILED COMMENT

Part I. Renunciation of War.

Articles 1 and 2a are taken from the Treaty of Locarno with hardly a word changed. However, the renunciation of war is stated much more clearly here by the elimination of details in the Locarno Treaty.

These three paragraphs contain three fundamental stipulations. Article 1 is the sweeping statement of the renunciation of war. But this would not and could not stand unless, at the same time, "the right of legitimate defense" was asserted with equal definiteness. Neither of these, however, would mean anything unless defense (and by implication aggression as well) were defined in terms recognizable by the world at large or at least by a third party. For most wars among civilized nations are wars of defense in the eyes of those who wage them, or are so camouflaged as to be presented to the world under the color of defense. The definition of a defensive war, as set forth here, is adapted from Article V of Locarno without which it would have been impossible for Great Britain to have signed that Treaty. As it is, the whole situation is set forth in the simplest possible way. That nation is really exercising legit-

imate defense which offers to submit the dispute to peaceful settlement when attacked by another. The aggressor is naturally the nation which goes to war refusing to meet the request for peaceful settlement or arbitration, or the court. This does not imply that in every case they must go to court, as we shall see later on.

Section b of Article 2 is a statement that the United States is not bound by this Treaty with reference to any action which it may take in pursuance of its traditional policy under the Monroe Doctrine, "provided that the United States will use its best endeavors to secure the submission to arbitration or conciliation" in case the dispute is between an American and a non-American Power. This Treaty, therefore, does not touch such questions as our own relations with other American States. All such matters are definitely and distinctly reserved from the action of the Treaty by this clause. It would not be impossible to draft the additional clause or clauses which would make a treaty like this applicable to the Americas. The present Treaty, however, provides only for cases arising under the Monroe Doctrine when the other Party is a non-American Power; this was the original purpose and direction of the Monroe Doctrine rather than the problems of inter-American politics.

Article 3 deals with the relations of the signatories of this Treaty to other States which have signed similar treaties, such as the European Locarno. It introduces the principle of a very important reform; that nations signing such documents as this "will not aid or abet the treaty-breaking Power." It recognizes a moral duty not to help an aggressor. As stated in this Treaty, this principle does not call for any change in international law. But some day in connection with the provision for the reduction of armaments in Article 5, or through some other connection, the civilized Powers will naturally proceed to give this principle a more far-reaching effect by denying the right of private shipment of arms on the part of neutrals to such treaty-breaking Powers. As this Treaty stands, it does not affect the private shipment of arms, unless the individual governments choose so to interpret it. Its legal obligation is limited to the action of the government itself and it does not cover the action of private citizens.

The next sentence in the Treaty is a very important one, "In the event that the treaty-breaking Power is one of the High Contracting Parties, the other Party recovers full liberty of action with reference to it." This is the American alternative to the much stronger obligations which members of the League of Nations have assumed. In the League of Nations a State which is attacked by another State in violation of the Covenant is assured the support of the other members of the League who are supposed to join in an attack upon the aggressor. The clause in this Treaty is very different indeed from the obligation of the Covenant; nevertheless it is of real importance and value. The proposition which it embodies was first made in the "Draft Treaty of Disarmament and Security" which was submitted to the League of Nations in 1924 by an informal American committee. That was the first time that the proposal was made to inaugurate a method of treaty enforcement which both leaves the High Contracting Parties free to apply the enforcement or not as they see fit; and yet, at the same time, puts a deterrent upon aggression by denying the aggressor any certainty of the continuance of friendly action toward it.

The next paragraph more definitely still insists upon the free prerogative of the United States in measures of general treaty enforcement such as those envisaged in this Article. It should be stated, however, for the other nations involved and perhaps in the form of an exchange of notes accompanying a treaty of this kind, that the United States has in the past found a way for furthering peace in other countries by way of a joint resolution of both Houses of Congress and the proclamation of the President. In the case of other Powers, existing treaty obligations should be noted, for some of them have treaties which definitely prescribe the mode of action in the event of a violation of a treaty of compulsory peaceful settlement. The United States, having no such treaty obligations, decides what it will do on its own account. There is no disharmony between these two since in the Treaties of Locarno the tests of aggression are those of this Treaty. The only thing is that the United States would not go so far in the general maintenance of peace as the other Powers have gone.

Article 4 recognizes the importance of accepted rules of law in the preservation of peace. There can be no disputing the importance of this principle nor of the need of a "progressive codification of international law based upon the renunciation of war as an instrument of policy, as set forth in this treaty."

Article 5. The provision for "the progressive reduction of armaments" is made not simply bilateral but general as among nations, and to that end the signatories will "study the appropriate ways and means." This could only be done in regular systematic meetings, in conferences on disarmament at which the question of reduction will be discussed point by point in proportion to the steady increase of the "will to peace" which is bound to flow from the enactment of such provisions as those of this Treaty.

These international conferences are expressly limited to technical study. They are not meetings of plenipotentiaries with power to bind the nations concerned but will leave the final arrangements to the governments themselves. This is a minimum requirement, but it might well turn out to be more effective than a provision for a more ambitious scheme which, under the present conditions, operates to some extent under conditions of mutual distrust. Fitted in to the whole of this Treaty the provision for disarmament is really more effective than any spasmodic efforts can ever be, however dramatic at the time.

Part II

This part of the Treaty contains two sections, one dealing with arbitration and the other with conciliation. A study of the text will show that the Treaty is decidedly not an effort to bind the United States to compulsory measures in either case. The Draft Treaty frankly admits in principle that there may be questions for which there is at present no known solution. It leaves these questions therefore unsolved and does not provide for them except the sweeping statement in the last clause in Article 6, "nevertheless, in every case the provisions of Part I shall apply"; that is to say that the signatories will not go to war about the questions at issue. The only war that is permitted is a war of defense. No war of policy can stand in a treaty based on the Treaties of Locarno.

Article 6 is a general article accompanying the whole of Part II and is inserted for the purpose of giving effect to a general provision that "a matter which under international law is solely within the domestic jurisdiction of one of the High Contracting Parties" is not necessarily to be taken to arbitration or conciliation. This means in plain English that the United States need not take questions of immigration to arbitration or conciliation unless in some future day and generation this question passes from domestic law to international law.

As in Part I, an exception was made of the Monroe Doctrine, so in Part II an exception is made of the chief problem between ourselves and Asiatic countries. It is of some interest that the text of the exception which here safeguards the United States is almost literally that which Japan insisted upon to safeguard its interests at the time the Geneva Protocol was being discussed in 1924.

Articles 7 and 8 contain the arbitration treaty now existing between the United States and France, Great Britain and Japan. The text is literally unchanged with the one slight exception that it permits reference to either the Court of Arbitration or to the Permanent Court of International Justice. The latter was not in existence when these treaties went into effect in 1908.

As these treaties all fall due in 1928, the occasion will present itself for some such slight modification as is here made in any case.

From Article 9 to the close, we have the so-called Bryan Treaties. The text of this section follows literally that of the Bryan Treaties except where indicated by italics. Four changes have been made.

1. The Bryan Treaties covered "any disputes of whatever nature they may be"; this section applies only to those which lie without the field of domestic law.

2. The Bryan Treaties provided only for inquiry as to the facts; this section provides for "recommendations for settlement," which may enable the parties to adjust their difficulties but do not bind them to do so.

3. In the last article of the section the Bryan Treaties allowed the parties to recover full liberty of action, but here (under Article 13) the provisions of Part I still apply, so that they do not recover liberty to go to war. They may not agree as to the settlement, but in that case they simply leave matters unsettled, awaiting some more favorable basis of future agreement.

4. The provision in the second section of Article I of the Bryan Treaties, that neither Party "shall resort to any act of force" during the period of investigation has been here transferred to a separate article (Article 14), so as to apply as well to arbitration procedure.

These relatively simple changes do, however, radically alter the setting of the Bryan Treaties. They were intended as "cooling off" treaties providing a period during which the signatories should not go to war, but at the end of this period of investigation, they were to be left free to fight if they still wished to do so. Now they are no longer left this freedom to go to war because of the provisions of Part I. The Bryan Treaties, therefore, are simply used to provide the machinery for conciliation commissions similar to those of Locarno.

Looking back over the whole Treaty, one finds that the structure is exactly similar to that of Locarno which also falls into three parts, the renunciation of war and provisions for arbitration and conciliation. The Locarno Treaties, however, have behind them the sanction of the League of Nations which makes them much more ironclad than this Treaty which attempts to state a compromise between American history and precedent and the new experiments of Europe. The greater degree of elasticity which is implied in the arrangement may ultimately offer some new suggestions to the solution of this world-old problem.